

**Before The
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of ACS of Anchorage, Inc.)	WC Docket No. 05-
281		
Pursuant to Section 10 of the)	
Communications Act of 1934, as amended)	
For Forbearance from Sections 251(c)(3))	
And 252(d)(1) in the Anchorage LEC)	
Study Area)	

COMMENTS OF COMPTTEL

COMPTTEL, by its attorney, hereby respectfully submits its comments in response to the above-referenced petition.¹ ACS of Anchorage, Inc. (ACS) asks the Commission to forbear from the unbundling obligations of section 251(c)(3) of the Communications Act of 1934, as amended (the Act), and the pricing standards of section 252(d)(1) of the Act, in the Anchorage Study Area.² ACS argues that its “chief competitor,” General Communication, Inc.

¹ COMPTTEL is the leading industry association representing communications service providers and their supplier partners. Based in Washington, D.C., COMPTTEL advances its member’s business through policy advocacy and through education, networking and trade shows. COMPTTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. COMPTTEL members create economic growth and improve the quality of life of all Americans through technological innovation, new services, affordable prices and customer choice. COMPTTEL members share a common objective: advancing communications through innovation and open networks.

² 47 U.S.C. §§ 251(c)(3) and 252(d)(1).

(GCI), controls approximately 49% of the local exchange and exchange access markets in Anchorage.³ As a result of this residential retail duopoly, and the fact that one company in Anchorage, GCI, serves some residential customers over its cable platform, ACS claims entitlement to the removal of all unbundling obligations for all network elements in all of Anchorage.

ACS notes that before the passage of the 1996 Act, the incumbent carrier enjoyed “nearly 100%” market share in Anchorage.⁴ Today, it complains that the “monopoly cable system operator in Anchorage” has taken nearly half of its customers.⁵ It is GCI’s market success that forms the only basis for ACS’s request for elimination of the UNE rules in Anchorage. For example, after describing GCI’s retail market share, ACS’s economic expert concludes that the “competition described [herein] deprives ACS of market power over retail services in the Anchorage study area.”⁶ Although evidence of GCI’s success (and ACS’s failure) in attracting retail customers may indicate that retail local exchange customers have a duopoly of providers to “choose” from in Anchorage, such evidence supports only an evaluation of the necessity of maintaining retail regulation of ACS’s local exchange service. Although retail competition may reduce ACS’s ability to raise retail prices above competitive levels, or to restrict its output for retail

³ ACS Petition at 1-2.

⁴ *Id.* at 1.

⁵ *Id.* at 2.

⁶ ACS Shelanski Statement at ¶ 11.

services, it will not constrain ACS's behavior in the wholesale market for UNEs, where all evidence on this record confirms that ACS is the sole supplier. Indeed, ACS concedes in its petition that it has already obtained non-dominant carrier status in Anchorage, and that its retail services are very lightly regulated as a result.⁷ But as set out in greater detail below, the actual relief that ACS seeks in the instant proceeding – the elimination of all unbundling in Anchorage – is not justified. The instant petition is based solely on evidence of retail residential market penetration by a single competitor. Granting ACS the relief requested would eliminate entirely the very nascent competition that ACS highlights in its petition.

I. **The ACS Petition Demonstrates that Unbundling is Working in Anchorage.**

Ironically, ACS sets out in its petition the very reason why the unbundling provisions of the Act are so vital to maintain in Anchorage. ACS points out that the majority of GCI's lines in service in Anchorage are provisioned using ACS UNEs. Specifically, as of June 2005, GCI served at least 51,000 customers via UNEs, and perhaps as many as 83,000 customers via UNEs.⁸ But ACS also points out that GCI's use of UNE loops *decreased* from the prior year by approximately 17%, during the same period that its

⁷ ACS Petition at 5.

⁸ ACS Meade Statement at ¶ 9. ACS explains that its records indicate that 51,000 GCI customers are served via UNE loops, and 32,000 GCI customers are served via certain GCI electronics that make it impossible for ACS to determine whether they are using UNE loops or not. Thus, ACS suggests that some portion of the 32,000 customers it identifies as provisioned using GCI facilities may in fact still be using ACS UNEs. ACS Petition at 14 n.25.

retail market share increased.⁹ ACS then argues that the ongoing availability of UNEs is deterring GCI from using its own facilities. In fact, the record evidence adduced by ACS supports exactly the opposite conclusion. As GCI's market share has increased over the past year, it is deploying more – not fewer – of its own facilities, and relying less on unbundled access to ACS's facilities. This is exactly the type of entry the Commission has long predicted would occur – new entrants enter a market by use of UNEs, and migrate to self-provisioned facilities after capturing sufficient market share to make such facilities deployment economical.¹⁰

Far from deterring competitive facilities deployment, it appears that UNE availability in Anchorage is spurring such deployment. As GCI builds its market share, it reduces its reliance on UNEs. But rather than permit this nascent competition to grow in Anchorage, ACS asks the Commission to squelch it. Beyond GCI, ACS points out that it has “interconnection agreements with other carriers that provide for the sale of UNEs,” but urges the Commission to foreclose the possibility of further competition despite the fact that numerous entrants have taken the necessary steps to begin competing in Anchorage.¹¹ For example, ACS notes that AT&T has a 3%

⁹ ACS Meade Statement at ¶15.

¹⁰ *See Triennial Review Remand Order (TRRO)*, FCC 04-290, at ¶ 3 (“This Order imposes unbundling obligations in a more targeted manner where requesting carriers have undertaken their own facilities-based investments and will be using UNEs in conjunction with self-provisioned facilities.”)

¹¹ ACS Petition at 3 n.8.

market share in Anchorage, a small but potentially growing level of competitive entry.¹² Even though AT&T, unlike GCI, has not yet reached the threshold of market penetration that it believes justifies facilities deployment, ACS would have the Commission eliminate UNEs, and thus the possibility that AT&T, or any other entrant, will ever get there.

II. The ACS Petition Fails to Set Out Proper Market Definitions

As a threshold matter, ACS's petition fails to set out the proper geographic and product market definitions and analysis necessary for the Commission to evaluate its request for forbearance. The geographic market defines the region in which a hypothetical monopolist that is the only producer of the relevant product or service in the region could profitably impose at least a "small but significant and nontransitory" increase in the price of the relevant product, assuming that the prices of all products provided elsewhere do not change.¹³ The appropriate geographic market definition is vitally important to the Commission's analysis of ACS's forbearance request, because the Commission must necessarily examine whether a customer of ACS's wholesale UNE services, faced with the price increase that would inevitably result from the elimination of the cost-based pricing obligations of section 251(d)(1) of the Act, could find another

¹² *Id.* at 30.

¹³ *See generally* DOJ/FTC Merger Guidelines § 1.21.

wholesale service provider with an identical substitute offering for a lower price than offered by ACS. In the case of both loops and interoffice transport, as discussed in greater detail below, the relevant geographic market cannot be the entire Anchorage LEC service area, because both loops and transport are location-specific network elements.

As to interoffice transport, ACS contends that GCI has an “extensive fiber network” and does not order any UNE transport from ACS.¹⁴ ACS argues that because GCI orders no UNE transport, GCI (and by extension, any other new entrant) is not impaired without access to UNE transport, and unbundling obligations can be eliminated. But as the Commission concluded in the *Triennial Review Remand Order*, the extent to which a new entrant faces impairment on an interoffice transport route can only be determined by an analysis of the specific parameters of that route.¹⁵ Specifically, economic characteristics of an interoffice route – including the length of the route and how much traffic the new entrant can aggregate for transport over that route – will determine whether the requesting carrier possesses existing and expected revenues sufficient to overcome the high costs of deployment.¹⁶ Indeed, the Commission specifically rejected the ILEC proposal for an MSA-wide analysis of the feasibility of self-deployment of interoffice transport,

¹⁴ ACS Petition at 11.

¹⁵ See *TRRO* at ¶ 79 (“Based on the economic characteristics described above and the variability of the cost of deployment, we measure impairment with regard to dedicated transport on a route-by-route basis.”).

¹⁶ *Id.* at ¶ 86.

noting that “the wide variability in market characteristics within an MSA, MSA-wide conclusions would substantially over-predict the presence of actual deployment, as well as the potential ability to deploy.”¹⁷

Not only does ACS argue that an MSA-wide analysis¹⁸ is appropriate here, notwithstanding the Commission’s clear rejection of such a proposal, but ACS offers no specific information regarding the characteristics of the Anchorage LEC study area that make it susceptible to competitive entry.¹⁹ Beyond noting that GCI has deployed some of its own cable facilities for use in transporting traffic, ACS offers no evidence that any other carrier could build its own transport facilities between ACS central offices. Indeed, ACS asserts that GCI refuses to offer wholesale capacity to other carriers such as ACS, and even argues that the Commission should impose UNE obligations on GCI so that ACS can use GCI’s facilities.²⁰ If competitive entry is as feasible as ACS argues, it is difficult to understand why ACS itself would need unbundling obligations imposed on its competitor – if a new entrant can afford to deploy facilities, as ACS argues, surely ACS can as well.

¹⁷ *Id.* at ¶ 82.

¹⁸ ACS uses the LEC study area in Anchorage as a geographic substitute for the Anchorage MSA.

¹⁹ Indeed, in the face of the obvious failure of its argument, ACS claims that the Commission “encouraged” the filing of forbearance petitions that present facts different from those considered in the *Triennial Review Remand Order*. ACS Petition at 19. The instant petition, to the extent it presents any facts about the suitability of Anchorage to competitive loop and transport deployment, makes the exact arguments rejected by the Commission in the *TRRO*, and thus presents no new arguments that justify the relief requested.

²⁰ ACS Petition at 50.

Similarly, as to local loops, ACS argues that the appropriate geographic market is the entire Anchorage LEC service area.²¹ But for the Commission to properly analyze ACS's petition, it must determine whether, in the absence of cost-based access to ACS's loop plant, a reasonably efficient entrant could find a substitute for ACS's loop plant, either by constructing its own loop or purchasing wholesale capacity from another carrier. ACS admits that the "core of this petition is UNE loop relief for the Anchorage market."²² As such, ACS attempts to conflate GCI's cable plant deployment in the Anchorage LEC service area with the availability of UNE loop alternatives in the entire Anchorage LEC service area.²³ The fact that self-provisioning or other wholesale options may be available somewhere in Anchorage is not dispositive of the specific question of whether they are available to the specific customer that the new entrant seeks to serve. Moreover, ACS argues that GCI is collocated in all five ACS wire centers in Anchorage, "which provides GCI with unrestricted access to virtually every customer in the Anchorage market."²⁴ But GCI is collocated in those central offices precisely to obtain access to UNE loops, and through those UNEs provide service to Anchorage consumers. In the absence of UNE loop access, GCI's collocation

²¹ *Id.* at 28.

²² *Id.* at 12.

²³ *Id.* at 14.

²⁴ ACS Shelanski Statement at ¶ 9.

arrangements would be stranded assets, and GCI would lose the very access to customers that prompted the carrier to collocate in the first place.

ACS also fails to properly define the relevant product market that underlies its request for forbearance. When one product is a reasonable substitute for the other in the eyes of consumers, it is included in the relevant market. Thus, the relevant market includes all products reasonably interchangeable by consumers for the same purposes. Rather than analyze whether available substitutes for unbundled loops and transport in the Anchorage area available for all services that new entrants might seek to provide – and that consumers might demand -- ACS breezes by this important threshold analysis with the claim that the “distinction between mass market and enterprise loops is irrelevant.”²⁵ Although this argument is attractive for ACS – it allows the incumbent to argue, for example, that GCI’s cable plant is a loop substitute for all potential customers, including both residences and businesses –it hardly qualifies as a real analysis of the merits of its forbearance request.²⁶ In the *TRRO*, the Commission flatly rejected the idea that “intermodal competition” from cable and fixed wireless providers supported relief from unbundling DS1 loops and other UNEs necessary for serving business customers.²⁷ Put another way, the Commission examined,

²⁵ ACS Petition at 12.

²⁶ *Id.* at 14.

²⁷ *See TRRO* at ¶ 193 (“We reject incumbent LECs’ assertions that the existence of intermodal competition – particularly from cable providers – in the high-capacity loop

and rejected, the argument that a single retail product – residential voice service – is a substitute for all other retail products that would no longer be available as a result of the elimination of UNEs. This is the very argument that underlies ACS’s petition. As such, the fact that GCI provides residential local exchange service does not speak at all to, among other things, UNE loops and transport used to provide service to business customers.

Ignoring the Commission’s determinations regarding the relevant product market in maintaining UNE loop access, ACS claims that UNE loops are no longer necessary in Anchorage because GCI is “the monopoly cable system operator in Anchorage” and can use its cable plant to provide cable telephony services.”²⁸ ACS also hints at other future alternatives, noting that “industry analysts project wireless and VoIP competition to grow significantly in the coming years,” by which ACS presumably means to argue that, although such alternatives are not present in Anchorage today, they may be in the future.²⁹ But the Commission has clearly rejected the argument that either VoIP³⁰, which relies on local loop transmission to reach the end user, or wireless, which the Commission has already found not to be

market warrants a nationwide finding that competitive LECs are not impaired without access to unbundled high-capacity loops.”)

²⁸ ACS Petition at 2, 35.

²⁹ *Id.* at 17.

³⁰ *See TRRO* at ¶ 39 n.188 (“Although we recognize that limited intermodal competition exists due to VoIP offerings, we do not believe that it makes sense at this time to view VoIP as a substitute for wireline telephony.”).

a substitute for wireline³¹, can be construed as justifying UNE relief today. Although ACS may provide evidence that certain retail local exchange customers have a choice of duopoly providers in Anchorage, such evidence supports only an evaluation of the necessity of maintaining retail regulation of ACS's local exchange service. And as noted above, ACS concedes in its petition that it has already obtained non-dominant carrier status in Anchorage, and that it therefore is very lightly regulated.³²

The relevant product market must take account of not only the different needs of retail customers for different types of service (residential customers versus business customers, for example), but also the different needs of new entrants seeking to provide such services. Although GCI may be able to serve residential local exchange customers over its cable platform, ACS does not suggest – nor could it – that all business customers could obtain the necessary capacity and service level from cable plant. ACS's petition thus completely fails to satisfy its burden under section 10 of the Act

³¹ See *In the Matter of Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, File Nos. 0001656065, et al., and *Applications of Subsidiaries of T-Mobile USA, Inc. and Subsidiaries of Cingular Wireless Corporation For Consent to Assignment and Long-Term De Facto Lease of Licenses*, File Nos. 0001771442, 0001757186, and 0001757204, and *Applications of Triton PCS License Company, LLC, AT&T Wireless PCS, LLC, and Lafayette Communications Company, LLC For Consent to Assignment of Licenses*, File Nos. 0001808915, 0001810164, 0001810683, and 50013CWAA04, WT Docket Nos. 04-70, 04-254, and 04-323, at ¶ 74 n.267 (2004). (“Therefore, we agree with the Applicants that few customers would substitute other telecommunication services, such as wireline services, for mobile telephony services. Customers of mobile telephony services are unlikely to find wireline services to be close substitutes because wireline services lack the mobility dimension of wireless services.”).

³² ACS Petition at 5.

to demonstrate that its forbearance petition is in the public interest.³³ All that the instant petition establishes is that if UNEs were eliminated in Anchorage, certain residential customers would continue to have a local exchange duopoly, and businesses would be faced with a telecommunications facilities monopoly.

III. The Lack of a Section 271 Access Backstop Forecloses the Removal of Section 251 Access Obligations.

In the *Qwest Omaha Forbearance Order*, the Commission noted that it did not need to take Qwest at its word that it would continue to provide access to facilities, notwithstanding the elimination of certain unbundling obligations of section 251(c)(3). Specifically, the Commission noted that Qwest would have to continue offering loop and transport access because “withdrawal of these loop and transport offerings would be impermissible under section 271, which requires Qwest to make its loop and transport facilities (among others) available to competitors at just and reasonable rates and terms.”³⁴ Indeed, in rejecting Qwest’s request for forbearance from checklist items four through six of section 271 of the Act, the Commission concluded that such relief “would not be in the public interest and would

³³ 47 U.S.C. § 160.

³⁴ *Qwest Omaha Forbearance Order*, FCC 05-170, at ¶ 80. It is important to note that COMPTTEL strongly disagrees with the Commission’s final disposition of the Qwest Omaha Forbearance Order and intends that appeal that decision. COMPTTEL points out the Commission’s reliance on section 271 in that design only to highlight the fact that ACS has no section 271 network element access obligations.

likely harm competition in the provision of telecommunications services in the Omaha MSA.”³⁵

In the instant petition, ACS asks the Commission to take its word that it will continue offering UNEs in Anchorage; when the same commitment was made by Qwest, the Commission completely rejected it. The Commission granted relief in Omaha because of what the Commission saw as “the availability of other regulatory protections that function as a backstop to prevent harm to competition – including, most notably here, section 271(c).”³⁶ Such a backstop is not available in Anchorage, and thus the Commission can take no comfort in ACS’s aspirations to voluntarily provision UNEs in the absence of a regulatory compunction.

The Commission also noted that its grant of forbearance in certain central offices was dependant on present and future competitive entry made possible by wholesale offerings that Commission rules would continue to require even after the grant of partial forbearance. In particular, the Commission noted that it found forbearance appropriate because of “retail competition that in part depends on Qwest’s wholesale offerings, and based on the potential competition facilitated by the Commission’s other rules, including the [section 271] checklist items”³⁷ Although the specific

³⁵ *Id.* at ¶ 100.

³⁶ *Id.* at ¶ 103.

³⁷ *Id.* at ¶ 105.

analysis conducted by the Commission in response to Qwest's forbearance request has no bearing on the analysis in the instant proceeding, the Commission reliance on the section 271 "backstop" in Omaha would seem to foreclose the grant of such relief in Anchorage, where no such backstop is in place.

IV. Conclusion

It is interesting to note that, by asking the Commission to at least grant forbearance as to GCI if it will not do so as to all carriers in Anchorage, ACS seems to hint at its support for the idea of a market duopoly in Anchorage.³⁸ Indeed, by arguing that competition between ACS and the "monopoly cable system operator" is sufficient to protect consumers in Anchorage, ACS is essentially asking the Commission to entrench that duopoly into perpetuity by eliminating UNEs and eliminate the possibility of future competitive entry.³⁹ But the Commission does not believe that endorsement of a telecommunications duopoly is a laudable regulatory goal.⁴⁰ As such, ACS's petition must be denied.

³⁸ ACS Petition at 50.

³⁹ *Id.* at 2.

⁴⁰ *See, e.g.*, "At FCC, Broadband Access Is Chief Issue," By James S. Granelli, Los Angeles Times, Dec. 19, 2005, (Q&A interview with FCC Chairman Kevin Martin) ("Q: So are you saying that two pipes aren't enough? A: Yes. In the long run, we've got to make sure that there are additional competitors as well. But I think that we're very fortunate that we've actually got two pipes into the homes that are competing today.")

Respectfully submitted,

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